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No. 98-1048

In the Supreme Court of the United States

OCTOBER TERM, 1998

MARJORIE A. MEESTER, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal employee who, after suffering a job-related injury, was required by the Department of Labor, pursuant to the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, to accept a special limited-duty job created by her employing agency or lose compensation benefits may bring suit under the Rehabilitation Act of 1973 to compel her employing agency to make further changes in that job as reasonable accommodations of the disability caused by her injury.

2. Whether the court of appeals erred in affirming without discussion the district court's refusal to allow petitioner to amend her complaint out of time to add a new demand for punitive damages in her related disparate treatment claim.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-19) is reported at 149 F.3d 855. The various orders of the district court (Pet. App. 20-43; App., *infra*, 1a-13a) are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1998. A petition for rehearing was denied on September 29, 1998. The petition for a writ of certiorari

[1] The appendix to the petition does not contain all of the relevant orders of the district court, most notably the September 13, 1996, order that ruled on the second issue that petitioner raises in this Court. We have therefore reproduced that order in an appendix to this brief.

was filed on December 23, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Employees of federal agencies, including the United States Postal Service, who are injured while performing their job duties have a right to workers' compensation benefits for those injuries under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.* (FECA). Under FECA, employees receive ongoing compensation and medical benefits when they suffer a loss of wage earning capacity due to a work-related injury. See 5 U.S.C. 8102(a). The liability under FECA of the United States or the employing agency "is exclusive and instead of all other liability * * * because of the injury or death." 5 U.S.C. 8116(c). The Secretary of Labor is authorized to administer the payment of benefits, adjudicate claims, and decide all questions arising under the statute. 5 U.S.C. 8124(a), 8145, 8149. The Secretary's decision "in allowing or denying a payment under [FECA] is * * * final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. 8128(b). The Secretary has delegated her responsibilities under FECA to the Director of the Office of Workers' Compensation Programs (OWCP). 20 C.F.R. 10.2.[2]

Compensation benefits are generally made through regular periodic payments for as long as the disability exists. However, a partially disabled employee who

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[2] The regulations codified in the 1998 version of the Code of Federal Regulations were in effect during the period relevant to this case but have been superseded by new regulations issued on November 25, 1998. See 63 Fed. Reg. 65,284.

"refuses or neglects to work after suitable work is offered to * * * him * * * is not entitled to compensation." 5 U.S.C. 8106(c)(2). See also 5 U.S.C. 8106(a); 20 C.F.R. 10.124(b).

Department of Labor regulations instruct the employing agency to "monitor the employee's medical progress and duty status by obtaining periodic medical reports." 20 C.F.R. 10.123(b). The agency may offer other jobs to a partially-disabled employee if it determines that the employee "is able to: (1) [p]erform in a specific alternative position which is available within the agency," or "(2) [p]erform restricted or limited duties" if "necessary accommodation can be made." 20 C.F.R. 10.123(c). Even if the employee has been terminated because he was unable to return to his regular position and the agency was unable to accommodate his limitations at that time, the agency may later "offer reemployment in a position suitable to the former employee's capabilities." 20 C.F.R. 10.123(d).

The Department of Labor's OWCP evaluates an offer of employment from the employing agency to determine if it is suitable, *i.e.*, is within the employee's educational and vocational capabilities, within any limitations and restrictions which pre-existed the injury, and within the limitations and restrictions which resulted from the injury. 20 C.F.R. 10.124(c). If OWCP determines that the work is suitable, the employee is notified and provided the opportunity to show that it is reasonable or justified for him to refuse the offer. 20 C.F.R. 10.124(e). If an OWCP claims examiner determines that the employee is not reasonable or justified in refusing the work, the employee's compensation benefits (but not medical benefits) are terminated. *Ibid.*

b. Under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, federal agencies may not discrimi-

nate against a "qualified individual with * * * [a] handicap[]." 29 C.F.R. 1614.203(b). An individual is qualified if he or she "with or without reasonable accommodation, can perform the essential functions of the position in question." 29 C.F.R. 1614.203(a)(6). Reasonable accommodations may include a variety of measures to enable an employee to perform the essential functions of the job, such as part-time or modified work schedules. 29 C.F.R. 1614.203(c)(2). Failure to provide reasonable accommodation may constitute unlawful discrimination under Section 501, but an agency is not required to make an accommodation that would impose undue hardship on the operations of its program. 29 C.F.R. 1614.203(c)(1).

The "remedies, procedures, and rights set forth" in Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, also apply to claims under Section 501. 29 U.S.C. 794a(a)(1). Under those procedures, a complainant is entitled to de novo review in federal district court of his or her discrimination claim, even if the claim has previously been denied by the employing agency or the Equal Employment Opportunity Commission (EEOC). See generally *Chandler* v. *Roudebush*, 425 U.S. 840 (1976).

2. Petitioner worked as a clerk for the Postal Service in the Fargo, North Dakota, area for several years until she developed chronic tendonitis and carpal tunnel syndrome. See Pet. App. 3, 24. She filed a FECA claim, and the Department of Labor determined that she had a 25% impairment of her upper extremities, which prevented her from performing her duties as a postal clerk. *Id.* at 3-4, 24, 38. The Postal Service offered petitioner several alternative limited-duty positions, but in consultation with her physician, she declined those offers as beyond her physical limitations.

Id. at 4, 38. The Postal Service then created a special limited-duty position for petitioner, under which her only duties are to provide customer service by telephone and to check in carriers. *Id.* at 38. That position did not previously exist, is not a regular Postal Service job, and will be eliminated if and when she leaves the employ of the Postal Service. *Ibid.* Petitioner's doctor "approve[d]" the position, although he stated that petitioner "would do much better to work 5 days only and have 2 consecutive days off." C.A. App. 184. The Postal Service determined it could not provide two consecutive days off because Mondays and Saturdays are its busiest days, and Sunday is always a day off. Pet. App. 4.

OWCP determined that the position was "fully consistent with [petitioner's] physical limitations" after reviewing the position, petitioner's medical records, and her doctor's recommendations. Pet. App. 4, 38; see also Gov't C.A. Br. App. Exh. 9. Petitioner did not refuse the job and avail herself of her administrative appeal rights under 5 U.S.C. 8124, which allows a claimant dissatisfied with an initial determination to obtain a hearing. See Pet. App. 7. Instead, petitioner accepted the job under protest, asserting that she needed two consecutive days off, as well as additional rest breaks. *Id.* at 4.

3. Petitioner then brought a civil action against the Postal Service in district court under the Rehabilitation Act, asserting that the Postal Service's failure to provide two consecutive days off, as well as better rest breaks, discriminated against her by reason of her disability. Pet. App. 4. Petitioner contended that those additional changes in her current duties would constitute a "reasonable accommodation" which, if granted, would enable her to "perform the essential functions of

the position in question." See 29 C.F.R. 1614.203(a)(6). In two other counts, petitioner argued that the Postal Service had accorded her disparate treatment by attaching conditions to her position that did not apply to other employees and that the Postal Service had retaliated against her for filing her discrimination claim. See Pet. App. 4.

The district court initially denied the Postal Service's motion to dismiss or for summary judgment on the reasonable accommodation claim. Pet. App. 24-35. Later, however, the district court vacated its earlier rulings and dismissed the reasonable accommodation claim. *Id.* at 36-39. The court concluded that "the position in question" for purposes of the reasonable accommodation analysis is petitioner's original postal clerk position, which she cannot now perform even with a reasonable accommodation, rather than her current limited-duty position. *Ibid.* "In essence," the district court concluded, "[petitioner] is presently receiving workers' compensation benefits under FECA in the form of a special job. Any further accommodations she claims to need as a result of her work-related injury was or is a claim available to her under FECA," which, the court concluded, she could not "bootstrap" into a Rehabilitation Act claim. *Id.* at 38-39.

The district court allowed the disparate treatment and retaliation claims to go to trial. Pet. App. 5. Shortly before the trial, petitioner moved to amend her complaint to add a claim for punitive damages under 42 U.S.C. 1981a(b)(1), but the district court denied the motion on the ground that petitioner had made the motion more than a year after the deadline that the district court had set for filing any motion to amend the complaint to add claims or defenses. App., *infra*, 3a. The trial proceeded, but the district court granted

judgment as a matter of law to the Postal Service on the retaliation claim at the close of petitioner's case. Pet. App. 5. The court submitted the disparate treatment claim to the jury, which returned a verdict for the Postal Service, and the district court then denied petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 5, 20-22, 23.

4. The court of appeals affirmed, with Judge Heaney dissenting. Pet. App. 2-19. The majority noted that the district court did not hold that FECA barred all claims under the Rehabilitation Act; indeed, the district court had proceeded with the disparate treatment and retaliation claims. *Id.* at 6. Rather, the court of appeals explained, the district court had barred only the reasonable accommodation claim. *Ibid.* The court concluded that the district court's determination that petitioner was not entitled to a jury determination on her failure-to-accommodate claim was correct. *Ibid.*

The court reasoned that petitioner "seeks accommodations in performing the alternative position she was awarded under FECA," which the Department of Labor held was within her physical capabilities, and thus she "is essentially asking us to hold that the Department of Labor was wrong in directing her to accept this position. Such a holding would contravene FECA's prohibition against judicial review of compensation decisions." Pet. App. 6 (citing 5 U.S.C. 8128). The court also stated that it had carefully reviewed petitioner's arguments regarding the disparate treatment and retaliation claims and found them to be without merit. *Id.* at. 7-8.

In dissent, Judge Heaney concluded that the court was in error in barring petitioner's reasonable accommodation claim, because "FECA and the Rehabilitation Act provide significantly different remedies," and

because FECA bars only tort remedies, not claims of discrimination under the Rehabilitation Act. Pet. App. 11, 13-14. The majority declined to respond to the dissent's arguments, concluding that "[t]he dissent either misconstrues or misunderstands the limited breadth and depth of * * * today's holding." *Id.* at 6 n.3.

ARGUMENT

The decision of the court of appeals does not conflict with the decision of any other court of appeals and does not warrant this Court's review. Although the court of appeals erroneously held that FECA bars petitioner's failure-to-accommodate claim under the Rehabilitation Act, its conclusion that petitioner is not entitled to a jury determination of that claim is correct on the facts of the case. Petitioner's second claim is insubstantial. Further review of petitioner's claims is therefore not warranted.

1. A determination by the Labor Department under FECA that a job is "suitable" for an injured employee as a substitute for compensation benefits does not as a matter of law preclude a claim under the Rehabilitation Act that the Postal Service failed to make reasonable accommodations to the employee's disability. Nonetheless, on the facts of the case, the court of appeals was correct that the Postal Service is entitled to summary judgment.

a. FECA, like most workers' compensation statutes, provides that its remedies are exclusive. FECA's exclusivity clause, 5 U.S.C. 8116(c), implements a trade-off typical of workers' compensation schemes, under which federal employees are guaranteed receipt of immediate fixed benefits regardless of fault and without need for litigation but give up the right to sue for damages in tort under statutes such as the Federal

Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2672-2680. See generally *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983). FECA's exclusivity provision, however, does not extend to bar actions under the Rehabilitation Act, even if those actions arise from the same factual basis as an employee's FECA claim.

In addition, FECA's preclusion-of-review provision, 5 U.S.C. 8128(b), establishes that the Department of Labor is the final decision-maker on FECA benefit claims. That provision bars suits challenging actions of the Department of Labor, not actions taken by other agencies in connection with FECA claims.

Moreover, administrative findings that have not been subject to judicial review generally are not preclusive in Rehabilitation Act suits. See *Chandler* v. *Roudebush*, 425 U.S. 840, 863-864 (1976) (federal agency determinations not preclusive in Title VII actions); *University of Tenn.* v. *Elliott*, 478 U.S. 788, 794-796 (1986) (same with respect to state administrative determinations); 29 U.S.C. 794a(a)(1) (remedial rights and procedures under Title VII apply under Rehabilitation Act). And a fair reading of FECA's provisions does not command any exception to that principle.

Petitioner's Rehabilitation Act claim does not seek to impose additional liability on the Postal Service "because of the injury" (5 U.S.C. 8116(c)) she suffered on the job. Rather, the claim seeks to hold the Postal Service liable for failing to make reasonable accommodations in the limited-duty job that it created for her subsequent to that injury. In addition, petitioner is not challenging any "action of the Secretary [of Labor] in allowing or denying a payment" under FECA. 5 U.S.C. 8128(b). Thus, FECA does not, by its terms, bar her failure-to-accommodate claim.

b. On the facts of this case, however, petitioner's failure-to-accommodate claim raises precisely the same issue that OWCP decided against petitioner when it determined that the limited-duty job created for her by the Postal Service was "suitable work" under 5 U.S.C. 8106(c)(1): whether petitioner needed additional rest breaks or two consecutive days off in order to perform the job because of the limitations caused by her work-related injury.

There is often substantial overlap between a determination under FECA that a job proposed by an employing agency is "suitable" and the question under the Rehabilitation Act whether further accommodations are required to accommodate the employee's disability. Compare 20 C.F.R. 10.124(c) with 29 C.F.R. Pt. 1630 App. § 1630.2(o) (Interpretive Guidance on Title I of the Americans with Disabilities Act). Central to both inquiries is whether the employee can, consistent with his or her limitations, perform the functions of the job without further accommodations.

Although in many circumstances the inquiries are not identical, no such circumstances are present in this case. First, a failure-to-accommodate claim may differ from a suitability determination under FECA if there has been a change in the employee's condition after the suitability decision that necessitates further accommodation. But petitioner has not alleged that such a change occurred here. Although petitioner claimed that she suffered some adverse health consequences as a result of the failure to accommodate her, see Pet. App. 15-16, she has not claimed that a deterioration in her condition has made accommodations necessary that were not necessary at the time the Labor Department determined that her limited-duty job was suitable. Indeed, she demanded precisely the same accommoda-

tions that she now demands under the Rehabilitation Act at the time of the Department's suitability determination.

Second, an accommodation may be required under the Rehabilitation Act to enable the handicapped employee "to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." 29 C.F.R. Pt. 1630 App. § 1630.2(o). But the Labor Department's determination whether the job is "suitable" depends solely on whether performance of the job is "within the employee's educational and vocational capabilities, within any limitations and restrictions which pre-existed the injury, and within the limitations and restrictions which resulted from the injury." 20 C.F.R. 10.124(c). Therefore, a job may be suitable, but further accommodations may nonetheless be required to enable the employee to perform the job with a proficiency that allows the employee equal opportunity for advancement or other rewards.

Petitioner has not alleged here, however, that the accommodations she desires are needed to enable her to perform at a level that will allow advancement or other rewards. Indeed, she could not make such an allegation, because (with minor exceptions not applicable in this case) advancement in the Postal Service for unionized employees like petitioner is based on seniority rather than performance, and there is no merit pay or other compensation provided as an award for superior performance. See *Agreement Between United States Postal Service and American Postal Workers Union, AFL-CIO National Association of Letter Carriers, AFL-CIO* (1990-1994).

Nor has petitioner alleged any other respect in which her accommodation claim differs from the issue decided

by the Labor Department when it found the job "suitable" under FECA.

c. Under those circumstances, although OWCP's suitability determination does not preclude petitioner's failure-to-accommodate claim, the suitability determination, as well as the evidence of the medical reports and process under which that determination was reached, is highly probative evidence that no accommodation is required. Cf., *e.g.*, *Chandler* v. *Roudebush*, 425 U.S. at 863 n.39; *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 114 (1991). The fundamental purpose of the reasonable accommodation requirement is to enable a person to perform the essential function of the position in question. See *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 287 n.17 (1987). The Rehabilitation Act does not entitle an employee to her preferred accommodation but only to a reasonable one. *E.g.*, *Keever* v. *City of Middleton*, 145 F.3d 809, 812 (6th Cir.), cert. denied, 119 S. Ct. 407 (1998); *Stewart* v. *Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286 (11th Cir. 1997), *Gile* v. *United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996); *Carter* v. *Bennett*, 840 F.2d 63, 67 (D.C. Cir. 1988). Cf. *Ansonia Bd. of Educ.* v. *Philbrook*, 479 U.S. 60, 68-69 (1986) (religious accommodations under Title VII).

On the record in this case, no reasonable trier of fact could find that petitioner needs further accommodations to perform the essential functions of her limited duty position. The Department of Labor determined that the position is suitable, without requiring any further accommodation. Petitioner's doctor "approv[ed]" the position as structured. C.A. App. 184. And petitioner has been performing the job successfully since 1991. C.A. App. 59 (First Am. Compl. ¶ 14). Those facts establish that, as a matter of law, the Postal

Service did not violate the Rehabilitation Act by failing to make further accommodations to petitioner's disability. The court of appeals therefore reached the correct result, and certiorari is not warranted.[3]

2. The narrow issue presented by the decision of the court of appeals does not warrant this Court's review in any event. The court's decision does not conflict with the decision of any other court of appeals, and a conflict will not arise in the future because the government, in cases like this one, will argue that FECA determinations have evidentiary weight rather than preclusive effect with respect to claims under the Rehabilitation Act or similar civil rights statutes.

The court of appeals did not hold that FECA bars all Rehabilitation Act claims; to the contrary, it noted with approval the district court's decision to allow petitioner's disparate treatment and retaliation claims to go to trial. Pet. App. 6. The court did not even hold that all reasonable accommodation claims are barred but rather that petitioner's "unique" failure-to-accommo-

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[3] The district court initially denied summary judgment on the ground that, although petitioner's doctor "approve[d]" the position as structured (C.A. App. 184), the doctor's statement that petitioner would "do much better" with two consecutive days off was ambiguous and raised a question of fact. Pet. App. 29-30. The court, however, later vacated that determination and dismissed the claim based on preclusion. See *id.* at 36-39. As we have explained in the text, the court should not have found the suitability determination preclusive; but it should nonetheless have granted summary judgment based on the absence of any genuine issue of material fact, particularly in light of the suitability determination and petitioner's own doctor's approval of the job. Those facts also establish that petitioner could not recover compensatory damages because the Postal Service had made "good faith" efforts to identify and to make reasonable accomodations. 42 U.S.C. 1981a(a)(3).

date claim was barred. *Ibid.* The decision appears to be the first reported court of appeals decision addressing that issue.

Petitioner alleges a conflict among the courts of appeals, but the cases she cites do not address the specific issue presented here—whether FECA bars a claim under the Rehabilitation Act for failure to make reasonable accommodations to a limited-duty job that the employing agency offered the claimant to avoid paying compensation benefits under FECA. The cases that petitioner cites (Pet. 7-8) involve the broader question whether FECA generally preempts discrimination remedies, such as under Title VII. As we have explained, the court of appeals expressly declined to hold that such general preemption exists.

Thus, in *Miller* v. *Bolger*, 802 F.2d 660 (3d Cir. 1986), one of the two court of appeals decisions that petitioner cites, the plaintiff alleged that he suffered retaliation for his testimony on behalf of a black fellow-employee, some of it in the form of physical attacks, and that the retaliation left him permanently disabled. 802 F.2d at 661. Although the plaintiff received FECA benefits for his physical injuries, the court of appeals determined that those benefits did not fully compensate him for the underlying retaliation, and he could therefore bring an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to obtain complete relief. 802 F.2d at 663-664. The plaintiff's claim in *Miller* was not, as is petitioner's claim here, based on the employing agency's failure to provide additional accommodations to a limited-duty position that the agency offered the claimant to avoid paying compensation benefits under FECA.

Similarly, in *Nichols* v. *Frank*, 42 F.3d 503, 515 (9th Cir. 1994), the plaintiff alleged sexual harassment that

caused several injuries. Among those injuries was post-traumatic stress, which entitled her to FECA benefits. The Ninth Circuit concluded that FECA did not bar the plaintiff's recovery under Title VII for her other injuries. In *Nichols*, as in *Miller*, the plaintiff's claim was not based on the employing agency's failure to provide additional accommodations to a limited-duty position that the agency offered the claimant to avoid paying compensation benefits under FECA.

In this case, petitioner also raised other claims under the Rehabilitation Act. The district court allowed those disparate treatment and retaliation claims to go to trial, and it allowed the disparate treatment claim (which somewhat overlaps the reasonable accommodation claim, see Pet. App. 20-22) to go to the jury. As we mentioned above, the court of appeals approved of the distinction between the different types of claims and cited that distinction in support of its holding affirming the dismissal of the reasonable accommodation claim. *Id.* at. 6. The decision of the court of appeals is thus fully consistent with the cases of the other courts of appeals.

3. Petitioner briefly raises a second issue, concerning whether the U.S. Postal Service is subject to punitive damages under the Civil Rights Act of 1991, 42 U.S.C. 1981a(b)(1), which allows an award of punitive damages against a party "other than a government, government agency or political subdivision." That issue, however, is not actually presented by this case.

The district court did not deny petitioner's punitive damages claim on the merits but rather refused to allow petitioner to add the claim by way of a motion to amend her complaint filed more than a year after the district court's deadline for amending the complaint to add new claims or defenses. App., *infra*, 3a. The court of ap-

peals affirmed that holding without specific discussion. Pet. App. 7-8. Petitioner suggests no reason why that holding was an abuse of discretion or otherwise in error.

Moreover, petitioner appears to concede that there is no conflict among the courts of appeals on the question whether the Postal Service is subject to punitive damages. See Pet. 9-10. The only court of appeals decision addressing that question that petitioner cites held that the Postal Service is not subject to punitive damages under Section 1981a(b)(1) because it is a "government agency" and thus comes within that Section's express exception to the authorization of punitive damages. *Baker* v. *Runyon*, 114 F.3d 668 (7th Cir. 1997). The Sixth Circuit reached the same result in *Robinson* v. *Runyon*, 149 F.3d 507 (1998). This Court denied certiorari in *Baker*. 119 S. Ct. 335 (1998). The Court should also deny certiorari here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHEASTERN DIVISION

Civil No. A3-93-80

MARJORIE A. MEESTER, PLAINTIFF

v.

MARVIN T. RUNYON, POSTMASTER GENERAL
UNITED STATES POSTAL SERVICE, DEFENDANT

[Filed: September 13, 1996
Received: September 17, 1996]

ORDER MEMORANDUM REGARDING TRIAL

The trial in this case is scheduled to begin on September 30, 1996. Plaintiff has moved to amend the complaint to add an alternative statutory basis for her disparate treatment claim (Lodged, but not filed), and to add further allegations of disparate treatment (Lodged, but not filed), and has separately moved to add a claim for exemplary damages (doc. #115). At this time, the court will rule on the pending motions and also take this opportunity to rule on several other issues that arose at the most recent "issues" conference.

I. Amending Complaint to Allow a Claim Under 29 U.S.C. § 791

This case took another dramatic turn following the United States Supreme Court's decision in *Lane v.*

Pena, 116 S. Ct. 2092 (1996), in which the Supreme Court stated that compensatory damages are not available in actions brought under 29 U.S.C. § 794(a) (hereinafter § 794(a)). The court respects, but does not agree with, the plaintiff's position that her complaint, as it now stands sufficiently asserts a disparate treatment claim under 29 U.S.C. § 791 (hereinafter § 791). Specifically, the only statutory basis that the plaintiff cites in her complaint, which would establish a disparate treatment action under the Rehabilitation Act, is § 794 (a).

In her most recent submission, the plaintiff correctly notes two instances in which the court cited § 791 in its September 18, 1995 order. The plaintiff explains that she relied on these citations to form a belief that the court already considered her claims to be under both § 794 (a) and § 791. The plaintiff further explains that this reliance caused her to believe that she did not need to further amend her complaint.

The defendant opposes the addition of a § 791 action because the defendant states that it has only prepared for a disparate treatment claim under § 794(a), which defendant claims carries a different burden of proof. The court agrees with defendant that § 794(a) and § 791 would have different standards and orders of proof. The court also agrees that amending the complaint, at this point, would cause defendant notable degree of prejudice. Nonetheless, the court rules that plaintiff's motion for amending the complaint to add a § 791 claim must be granted. Although the court suspects that no one actually relied on the introductory, inadvertent citations in the court's September 18 order (as neither party commented on the court's citation in the motion to reconsider that order), the court cannot rule that plaintiff's claimed reliance on the court's earlier order

was unreasonable. Therefore, the court rules that plaintiff will be allowed to amend her complaint to assert § 791 as the basis for her disparate treatment claim.

II. Amending Complaint to Allow Exemplary Damages

Plaintiff filed a motion on August 23, 1996 to amend her complaint to seek exemplary damages. (doc #115). In this case, the parties submitted, and the court approved, a scheduling plan which allowed the parties until March 1, 1995 to move to amend pleadings to add claims or defenses. (doc. #9, at 2). Neither party has requested an extension of this deadline. Granted, this case has experienced many postponements. However, the court finds that those difficulties do not excuse a motion filed over sixteen months late. Furthermore, the court does not consider *Baker v. Runyon*, No. 95 C 4257 (N.D. Ill. April 18, 1996), as providing plaintiffs with novel legal precedent that would allow them to file this motion at this late date. Therefore, the court denies plaintiff's motion to amend her complaint to seek exemplary damages against the defendant.

III. Amending Complaint to Allow Additional Allegations of Disparate Treatment

Plaintiff, in her most recent *proposed* Amended Complaint, seeks to pursue additional allegations of disparate treatment. The court notes that these allegations have generally been a part of the record since this action was filed. (doc. #1). However, in the plaintiff's *filed* Amended Complaint (Filed May 17, 1996, which was accepted by the court), she characterizes these allegations as claims of retaliation. (doc. #101, at 4-5). The court concludes that it will not allow this further

amendment to the complaint, at this late date, as it would unduly prejudice the defendant. The court allowed the plaintiff the luxury of amending her complaint on May 17, 1996. If plaintiff wanted to establish these allegations as both retaliatory treatment claims and disparate treatment claims, she could and should have done so at that time. Accordingly, the court will not allow the plaintiff to pursue the additional disparate treatment claims contained in her most recent *proposed* Amended Complaint.

IV. The Protected Activity that Gave Rise to Plaintiff's Retaliation Claims

The court notes that an issue exists as to which "protected activity" plaintiff's retaliation claims seek to redress. Defendant argues that plaintiff can only assert retaliatory conduct based on plaintiff filing an EEOC charge. The plaintiff, on the other hand, argues that she should be able to assert retaliatory conduct based on her EEOC charge, *and* her actions in obtaining workers' compensation benefits.

The court rules that the plaintiff can only claim retaliatory treatment in response to her filing an EEOC charge. In her *filed* Amended Complaint, plaintiff alleges, "The Defendant took adverse employment actions against the Plaintiff because she filed a complaint of discrimination with the Equal Employment Opportunity Commission (EEOC)." (doc. #101, Amended Complaint, Count III, at 4,). Similarly, in the approved pretrial statement, under "CONTROVERTED AND UNRESOLVED ISSUES," the parties together listed as an issue for trial: "Whether or not the Defendant engaged in retaliatory conduct against the Plaintiff by reason of Plaintiff engaging in protected activity of making a discrimination claim." (doc. #100, at 11 (letter "g")). The

court notes that in her most recent *proposed* Amended Complaint, the plaintiff asserts retaliation because she "filed a workers compensation claim." (Lodged, but not filed, at 5). The court, however, finds that this proposed amendment has been filed too late. Again, the court afforded the plaintiff the luxury of filing an amended complain only four months ago. At that late stage, plaintiff should have understood how her claim should be characterized, and the defendant should be entitled to rely on that characterization to prepare for trial.

In addition to the untimeliness of plaintiff's request, the court finds that the retaliatory conduct theory was intended only to protect individuals who seek or participate in actions to redress discrimination. The Rehabilitation Act borrows from Title VII to provide individuals protection from retaliatory conduct. *See* 29 U.S.C. § 794a (a) (2). Title VII creates a remedy for only certain types of retaliatory conduct. Specifically, 42 U.S.C. § 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice *by this title*, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing *under this title*.

42 U.S.C. § 2000e-3(a) (emphasis added). The court considers the statute's language clear and unmistakable. The statute would not provide redress for conduct that was done in retaliation for bringing a workers' compensation claim. Plaintiff's only possible redress for such a claim would be with the Department of Labor. Accordingly, the court rules that it will not allow the

plaintiff to allege retaliatory conduct, based on her seeking workers' compensations benefits.

V. The Status of Plaintiff's Individual Retaliation Claims

Until this point, the parties and the court have focused on other issues in this lawsuit and have not thoroughly addressed plaintiff's retaliation claims. In her Amended Complaint, the plaintiff asserts:

The adverse employment actions by the Defendant included the following:

a) Intimidating Plaintiff to perform tasks unrelated to her limited-duty assignment that she should not otherwise perform by reason by her disability;
b) Scheduling Plaintiff to work holidays when other similarly situated employees were not scheduled;
c) Failing to schedule Plaintiff for training sessions when other similarly situated employees were scheduled;
d) Delaying Plaintiff's EEOC process;
e) Ignoring Plaintiff's physician's recommendations;
f) Failing to pay Plaintiff for storm days when other similarly situated employees were paid; and
g) Interfering with Plaintiff's efforts to obtain rest breaks.

(doc. #101, at 4-5).

In its May 17, 1996 order, the court dismissed, with prejudice, plaintiff's claim seeking further accommodations for her alleged disability. (doc. #99, at 4). Briefly, the court reasoned that the plaintiff could no longer

perform the essential functions of her original position and that further accommodation her disability must be sought through FECA. *Id.*

Upon review of the complaint, the court finds that several of the plaintiff's allegations of retaliation are actually requests for further accommodation. Specifically, under allegation "a," plaintiff asserts that the defendant has "[i]ntimidat[ed] Plaintiff to perform tasks unrelated to her limited-duty assignment that she should not otherwise perform by reason by her disability. . . ." (doc. #101, at 4-5). The court finds that simply using the word "intimidate" does not change the nature of defendant's alleged failure to reasonably accommodate the plaintiff's physical condition. Furthermore, the court finds that insisting that an employee perform work that the worker is incapable of doing is not the type of "adverse employment action" that the retaliatory conduct theory is intended to redress. In order to establish a prima facie case of retaliation, a plaintiff must show (1) that she filed a charge; (2) that an adverse employment action was subsequently taken against her; and (3) that a causal connection exist between her engaging in protected activity and the adverse employment action. *See Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 474 (8th Cir. 1992).

"Title VII was designed to address ultimate employment decisions, not address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). To establish an "adverse employment action" in a non-termination case, a plaintiff, at a minimum, must show that the defendant's actions created a "hostile work environment," which

altered the terms or conditions of the plaintiff's employment. In *Saxton v. American Telegraph and Telephone Co.*, the Seventh Circuit Court of Appeals stated: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Saxton v. American Telegraph and Telephone Co.*, 10 F.3d 526, 534 (7th Cir. 1993) (citation omitted). In the present case, the court finds that the defendant's alleged conduct would not constitute an "adverse employment action" and cannot, therefore, be the basis of a retaliatory conduct claim.

Furthermore, the defendant recently asserted that the only time which the plaintiff claims to have been intimidated was the summer of 1992. (doc. #117, Defendant's brief, at 14). If the defendant's assertion is correct, the defendant's alleged conduct would have occurred *before* the plaintiff's EEOC claim, which was filed in December of 1992. Therefore, if this was the only occasion of "intimidation," then it could not be considered retaliation. Accordingly, because the court finds this issue to actually be one of reasonable accommodation and that the defendant's alleged conduct could not be considered an "adverse employment action," under the Rehabilitation Act and Title VII, the court rules that the plaintiff cannot seek redress for the defendant's alleged "intimidation" through a claim of retaliatory conduct.

Next, the court considers allegation "e" to clearly be a charge that the defendant has failed to reasonably accommodate her disability. Plaintiff claims that the defendant "[ignor[ed] Plaintiff's physician's recommendations. . . ." (doc. #101, at 4-5). Furthermore, for

the reasons previously stated, the court does not consider "ignoring" a doctor's recommendations as an "adverse employment action" that could establish a retaliatory treatment claim. Therefore, the court rules that the plaintiff may not assert the defendant's alleged indifference towards the recommendations of plaintiff's doctor as a retaliatory treatment claim.

Finally, the court also considers allegation "g" to be a thinly disguised complaint that the defendant has failed to accommodate the plaintiff's disability. Plaintiff asserts that the defendant has "[i]nterfer[ed] with Plaintiff's efforts to obtain rest breaks." (doc. #101, at 4-5). Furthermore, not only does the court consider this a claim for reasonable accommodations, the court does not consider interfering with rest breaks to be the type of employment practice that the retaliation theory was designed to remedy. Thus, the court will not allow the plaintiff to claim that the defendant obstructed her efforts to take rest breaks, as a retaliation claim.

The next retaliation claim that the court will address is allegation "d" of the Amended Complaint. At allegation "d," the plaintiff asserts that the defendant has "[d]elay[ed] Plaintiff's EEOC process. . . ." (doc. #101, at 4-5). The federal court considers discrimination claims after the EEOC concludes its proceeding. The court does not police the EEOC process. If the plaintiff's EEOC process was delayed by the defendant, the plaintiff could have south redress through the EEOC officer in charge of the case. Assuming, arguendo, that the defendant did delay plaintiff's EEOC process, the defendant's actions would not have any direct effect on the terms and condition of plaintiff's employment. Considering the fact that the plaintiff ultimately did get her EEOC complaint considered, the court cannot construe

the defendant's alleged act of delaying the EEOC process to be an "adverse employment decision." *See Page v. Bolger*, 645 F.2d 277, 233 (4th Cir. 1981) (stating that "it is obvious to us that there are many interlocutory or mediate decisions having no immediate effect upon employment conditions which were not intended to fall within the direct proscriptions of . . . Title VII"). Accordingly, the court will not allow the plaintiff to assert the defendant's alleged delay of the EEOC process as a retaliatory conduct claim.

Although the court has reservations about allegations "b" and "f" of the plaintiff's retaliation claim, the court will not constitute an "adverse employment action," unless the employer's acts establish a "hostile work environment," or otherwise substantially affect an employee's terms or conditions or employment. If the plaintiff cannot fulfill either of the court's requests, the court will dismiss the defendant's alleged denial of training opportunities to the plaintiff as a basis for a retaliatory treatment claim.

VII. The Court's Understanding of Plaintiff's Disparate Treatment Claim and Defendant's Corresponding Defenses

The court, as it did at the "issues" conference, will offer the parties its present understanding of the plaintiff's disparate treatment claim. The court sees this claim as a fairly simple and straight-forward claim. For the purposes of this disparate treatment claim, the only issue is whether the defendant's offer treated Meester differently than non-disabled employees by reason of her disability. Specifically, during the EEOC proceedings, the defendant offered Meester a full-time regular position, with limited duties, but without two consecutive days off. The plaintiff claims that all other

employees, at the Prairiewood Station, who were converted to full-time regular status, received two consecutive days off. Conversion to full-time regular status does not, in itself, create an entitlement to two consecutive days off. Yet, all other full-time regular employees at Prairiewood, plaintiff claims, receive two consecutive days off.

Plaintiff has the initial burden of showing dissimilar treatment. If she shows she was treated differently than nondisabled workers with respect to conversion, the defendant must assert some nondiscriminatory reason for treating her differently. One possible explanation was stated by Richard Bolme at his deposition. When asked why the plaintiff must work on Saturdays, Bolme answered, "Because we can better utilize her on Saturdays because that's the off days for the other window clerks and that's when we're the shortest on help are Saturdays and Monday. . . ." (Bolme Deposition, at 22). Furthermore, Bolme stated, "We can best utilize her duties on Saturday answering the phone, doing the accountable carts. I'm always short on help on Saturdays." (Bolme Deposition, at 24). If substantiated, an explanation that plaintiff's limited duties were needed more on certain days than others could provide a nondiscriminatory reason for different treatment.

The court considers irrelevant any argument by the defendant that since it was not obligated to convert the plaintiff to a full-time regular position in the first place, a job offer to her that was different from the conversion of others is not discriminatory. In a prior memorandum, the defendant stated:

> We assume, therefore, that the Postal Service will be permitted to defend on the basis that it was its good-faith belief that the plaintiff was not qualified

> for conversion, rather than a discriminatory motive, which prevented it from unilaterally converting her.

(Doc. #113, at 4). The defendant further stated:

> If the true reason she was not converted unilaterally was a good-faith belief that she was not legally and factually qualified for conversion, then there can be no Title VII violation for which compensatory damages can be awarded.

Id. at 8. The court considers whether or not the defendant was obligated, due to a union agreement or other commitment, to convert the plaintiff to be irrelevant because the defendant did in fact offer her full-time regular status. The relevant question is not "whether" the plaintiff should have been converted, but rather "how" she was actually offered conversion. That offer moots any issue of entitlement or nonentitlement to full-time conversion.

Again, conversion to full-time regular does not, in itself, create an entitlement to two consecutive days off. Yet, plaintiff claims all other employees at Prairiewood, who were converted to full-time regular status, were given two consecutive days off. If this is accurate, the defendant cannot defend the claim by arguing the plaintiff is not entitled to two consecutive days off, since others are receiving this benefit despite not being entitled to it.

The defendant has also raised the issue of the plaintiff transferring from the Prairiewood station to the downtown main post office. If the defendant could show that the plaintiff could have more easily achieved her desired schedule by transferring downtown, then the court would consider that testimony as supporting

Bolme's contention that requiring the plaintiff to work on Saturdays was due to scheduling concerns and not discrimination based on disability. Also, if seniority was a factor in the defendant's decision—if Meester had less seniority than other full-time regular employees at Prairiewood—the court would also consider that as supporting the defendant's non-discriminatory reason.

The plaintiff will have the ultimate burden of proving discrimination.

VIII. Pre-Trial Submissions

The court will allow the parties until Monday, September 23, 1996 to submit their proposed jury instructions, verdict forms, and trial memoranda.

IT IS SO ORDERED

dated this 13th day of September, 1996

/s/ KAREN K. KLEIN
KAREN K. KLEIN
United States
Magistrate Judge